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December 16, 2020

## OUR TOP STORY

**Key steps to take to avoid the appearance of illegal retaliation**

## 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

**Dos and Don'ts after complaint**

**Age bias at rest stop ends in fine**

**Millenials suffer during pandemic**

**'Scatterbrain' sues her boss!**

## She reported her suspicions and was transferred; was it retaliation?

*Worker felt certain others were stealing company property*

**I** strongly suspect two of our employees are stealing supplies," Maria said in a hushed voice.

Robert, her supervisor, was surprised.

"That's a serious charge, one that could get them fired," he said. "Give me some details. Who's doing it?"

"OK," she nodded, "but first you should understand something.

"I know business has been down, and that the company is struggling. So I'm only doing this to help.

"I don't have an ax to grind, and I don't take any pleasure in seeing someone here

get into trouble or get fired."

"Understood," Robert said. "You've never been the type to try to hurt another employee. So, what do you know?"

### 'What stuff?'

"Well," she began, "when I was working late twice this week, I saw John and Alex loading stuff into John's van."

"What stuff?" Robert asked.

"One time it was a laptop computer. They were coming out of the IT storage area where we keep the extra computers.

*Please see Suspicious... on Page 2*

## Sharpen Your Judgment

### 'Troublemaker' says he's the victim of retaliation

**W**ally was in here yesterday, complaining to me about how you give him the worst jobs in your group," HR director Maddie Scott said.

"Wally's always complaining about something," George sighed. "He's the worst person I've ever supervised. On top of that, he's a troublemaker."

"In what way?" Maddie asked.

"I've overheard him stirring up the other employees here about starting a union," George explained. "Frankly, I don't agree with his views, and I told him so. And I also told him that as long as he kept it up, he was going to get the crummy jobs."

"That sounds a little risky," Maddie noted. "Has his union talk hurt his performance or the performance of your group?"

"Not directly," George said. "But you can imagine how his views are affecting the others. Pretty soon, I'm going to have a mutiny on my hands. So I've made my position clear to Wally: As long as he keeps up with the union talk, he'll keep getting tasks no one else wants to do."

### He sues

Wally finally sued the company for retaliation, saying work assignments shouldn't be made based on employees' views about unionization.

The company said it had allowed Wally to keep his job, and that the supervisor had a right to use any work-related means to discourage talk about starting a union.

Did the company 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.*

# Suspicious ...

(continued from Page 1)

The other time it was a printer and some paper. And one time I heard them say they were starting their own at-home business. That got my attention.”

“A computer, a printer and some paper,” Robert repeated as he made some notes. “OK, I’ll look into it. In the meantime, don’t mention this to anyone else.”

## It’s nothing

A week later, Robert called Maria into his office. He began speaking as she sat down.

“That thing with John and Alex turned out to be nothing. They volunteered to test some new programs and needed a computer and other stuff. IT vouched for them.”

“That’s a relief,” Maria sighed.

“It is,” he agreed. “But now we have another problem. The head of IT asked how I knew they were moving the stuff, and I told him you saw them.”

“So?” she said.

“Well – and I’m not happy about this – he told John and Alex,” Robert explained. “Then they told other employees that you ‘ratted’ on them.”

She exclaimed, “But you know why I did it and why I ...”

“I know, I know,” he said. “Still, some people in our group don’t want to work with you. I’m sorry, but I’m going to have to transfer you to Wendy’s unit.”

## Middle ground

“Wendy’s unit?” she shouted. “No one wants to work there because they have to work weekends. It’s not fair.”

“I have to figure out some middle ground here to keep everyone happy,” he said. “That’s the best I can do.”

Rather than take the transfer, Maria sued the company for retaliation. She said she was being punished for reporting a suspected crime.

The company responded by arguing that she was being moved in the interests of workplace harmony, not as a means of retaliation.

**Decision:** The company lost when a judge ruled that the transfer indeed was a form of retaliation,

especially since:

- The new position was widely perceived as less desirable, and
- The employee acted reasonably in reporting the suspected theft.

**Key:** Supervisors have to carefully analyze personnel actions – transfers, terminations, etc. – following a complaint or other protected activity.

*Case: Higgins v. Pascack Valley Hospital.*

### What you need to know:

Questions of retaliation can arise when an employee files a complaint and then the employee is:

- transferred to a less desirable position, in terms of pay, status or working conditions
- terminated or demoted, or
- disciplined.

To best protect yourself, and your organization, consult with HR to make sure:

- you have adequate documentation to back up your decisions, or
- the decision, such as a transfer, doesn’t have the appearance of retaliation.

## TEST YOUR KNOWLEDGE

### Some Dos and Don’ts when a complaint is made

Let’s say an employee comes to you with a complaint of harassment, bias, or some other illegal treatment.

Your first reactions are essential to whether the complaint can get settled in-house, or escalates into a costly, messy lawsuit.

To determine the best ways to respond to an employee complaint, answer *True* or *False* to the following:

1. It’s best to allow a cooling off period of a few days after a complaint is filed, rather than jump in and investigate right away.
2. Take written notes on what the employee says and get the employee’s agreement that what you’ve written accurately reflects the employee’s complaint.
3. It’s a good idea to try to transfer the complaining employee to separate him or her from the accused party.

## ANSWERS

1. *False.* The complaining employee needs to see that you are taking action immediately.
  2. *True.* As the investigation proceeds, memories get dim and stories can change.
  3. *False.* If the complaining employee insists, consider the move to separate the alleged harasser and the victim.
- But if the transfer seems undesirable to the alleged victim, it can easily be made to look like you are punishing the employee for filing the complaint. That’s what’s known as illegal retaliation.

### 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.*

### **NC rest stop operator pays \$39K for age bias**

**What happened:** Liberty Support Services, Inc., Raleigh, NC, which maintains state-owned rest areas throughout the state, fired or refused to rehire four rest area attendants employed at the Cherokee County Rest Area.

In 2016, the state closed the rest area for renovations and the attendants expected to return to their jobs when renovations were completed. Five months later, the attendants – all of whom were over the age of 40 – learned they had been discharged and replaced with substantially younger workers. The EEOC asserted that Liberty Support discharged or failed to rehire the employees because of their ages.

**Decision:** Along with paying \$39,139, the firm agreed to adopt an anti-discrimination policy and provide training for its owners and employees on the ADEA and its prohibition against discrimination in the workplace because of age. The company will also post an employee notice about the lawsuit and employee rights under federal discrimination laws and provide periodic reports to the EEOC.

**Cite:** EEOC v. Liberty Support.

### **AZ firm discriminated against Mexicans**

**What happened:** Managers at Trafficade Service, Inc., a Phoenix-based work zone services company, repeatedly used racial slurs when referring to two Mexican American employees and created an unsafe workplace

for them.

The EEOC also contended that Trafficade retaliated against them for complaining to management about the harassment and filing charges of discrimination with the EEOC.

**Decision:** The firm agreed to pay \$80,000 in compensatory damages and back pay to the two employees. In addition, Trafficade will review and revise its policies and provide training on federal employment laws to its human resources director, executive managers and all line staff. It will also issue letters of regret to the harmed employees.

**Cite:** EEOC v. Trafficade.

### **Pub pays \$20K for sexual harassment, retaliation**

**What happened:** A male cook at Locos Grill & Pub, which has locations throughout Georgia, made sexual advances toward a female cook.

According to the EEOC's complaint, the male cook made obscene physical displays to her and indecent propositions, and the female cook reported the sexual harassment to the company. After receiving her complaints, Locos Grill & Pub never again scheduled her for work, the EEOC said.

**Decision:** Locos will pay \$20,000 in monetary damages to the female former employee. The company also agreed to regular reporting, monitoring, annual training, distribution of anti-harassment and anti-discrimination policies, and notice posting.

**Cite:** EEOC v. Locos Grill & Pub.

## STOP, LOOK, LISTEN ...

### Millennial pandemic health

Nearly one in three millennials suffers from mental health conditions, and COVID-19 is only making it worse, says a new study.

Over a five-year period, there's been a downward trend in the health of millennials (aged 22-37), says the Blue Cross Blue Shield Association study. Researchers found among millennials, there's been a:

- 43% increase in major depression
- 39% increase in ADHD, and
- 17% increase in substance abuse.

Most millennials (92%) said the COVID-19 pandemic has had a negative impact on their mental health, leading to increases in drug use, drinking, smoking and vaping.

These behavioral health conditions put millennials at roughly twice the risk of having chronic physical conditions, such as:

- high cholesterol (1.7x)
- hypertension (1.9x)
- Crohn's disease/colitis (1.9x)
- Type 2 diabetes (2.1x), and
- coronary artery disease (2.7x).

To prevent a behavioral health epidemic among millennials, firms need to familiarize them with their employee health benefits. Here's how:

- **Stress holistic health:** Educate workers on the importance of primary care – the best place to access the healthcare system for physical and mental health.
- **Ensure convenience:** Offer multiple access points to virtual care and digital wellness apps, specifically in the areas of behavioral health.
- **Consider new approaches:** Firms are providing more personalized approaches to health care – which caters to millennials. For example, Wellvolution is a new offering that mixes a digital platform with a wellness program that matches workers with providers based on their goals.

## SUPERVISORS SCENARIO

# Boss regretted calling her ‘scatterbrain’ – and he was sorry about the lawsuit she filed, too

*‘Common’ slips supervisors need to make less common*

“You’re just going to have to improve if you expect to keep your job,” Dale said bluntly. “But I think you know that from our other talks.”

“You mean I have to get better at ‘the guy stuff,’” Gina smirked.

“The guy stuff?” Dale said. “What’s that supposed to mean?”

“You said I was disorganized – I think ‘scatterbrain’ was the word you used.”

## Mistakes cost big-time

Dale exhaled. “I shouldn’t have said that. But you are disorganized. It’s cost us big-time, too, when you couldn’t locate important documents or you overlooked critical deadlines.”

“But the guys are good at that, right?” she shot back. “It hits me that you’ve chosen to harp on my weakness while ignoring my strengths, like creativity and communication. But of course those are ‘women skills’ so they’re not important.”

“I’ve recognized your strengths, but being organized is so important in your job that I can’t ignore it,” Dale explained.

“And yes, most of the guys in your group are better organized than you, and that does give them an edge in that job.”

Gina eventually was fired when her lack of organization ended up causing the loss of a big customer.

She sued for gender bias, pointing out that her male supervisor stacked the deck by using standards that put her at a disadvantage and gave an advantage to the men in the group.

The company argued the choice of standards was based on their importance to the job and the business.

**Decision:** The company won. The prime supporting evidence: The mistakes related to the standards were documented and had badly hurt business.

**Key:** It’s important to let employees know what your important standards are from Day One, so no one thinks you’re making it up as you go along.

Then, stick with those standards and apply them fairly and consistently.

*Case: Garcia v. Bristol-Meyers Squibb Co.*

## What you need to know:

Whether or not you have formal job descriptions for your employees, it helps to have a priority list of tasks, skills and qualifications so that employees know what’s important.

To put together that list:

- Consider what’s most important for your organization and what items most contribute to the organization’s overall goals.
- Talk with HR and your boss to get the views of a 2nd and 3rd pair of eyes on your list; they might come up with items you’ve missed.

## Sharpen Your Judgment – THE DECISION

*(continued from Page 1)*

No, the company lost.

A judge ruled the supervisor, being part of management, couldn’t impose harsh working conditions on an employee just to discourage talk about unionization.

Such action violates regulations in the National Labor Relations Act, which prohibits threats involving, for example, working conditions, job placements or terminations.

### What you can limit

Generally, employers have the right to limit discussions at work, particularly if such talk tends to have a negative effect on business. For instance, an employer can limit, and even halt, debate about political candidates or policies.

Talk about unions or labor organizing falls into a whole different category, however, as far as the law is concerned – to a point.

What isn’t different: Employees can’t shirk their duties to engage in pro-union activity; you still have the right to insist that employees do their jobs in a way that meets the standards you’ve set for performance.

If you were going to discipline an employee for spending too much time on those activities, you most likely would have to show how the employee isn’t meeting your established standards for success. And that underscores another reason why documentation of performance standards is so important.

*Case: Fleming Companies, Inc. v. NLRB.*

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