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January 4, 2021

OUR TOP STORY

**Supervisor's
tough decision
turns into a
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Management Minutes

6-point checklist to
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Stay Legal!

7 questions to ask
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Poor performer bad-mouths the company – what's over the line?

He claims boss set him up to fail

I'm sure you remember that we had agreed to a six-month trial on your promotion," Supervisor Bonnie Jacobs said.

Phil just nodded.

"Well, it's just not working out," Bonnie said. "I've decided to move you back to your old job."

"I think you set me up to fail right from the start," Phil said.

"Why would I waste my time and do something like that?" she replied.

"Because you thought I was too old to do the job in the first place," Phil said. "You

just didn't want to turn me down outright because it would look bad."

'Old guy job?'

"That's just not true," Bonnie said. "What I can tell you for sure is I still want you to work here ..."

"... as long as I stay in my little flunky old guy job, right?" he interrupted.

Bonnie didn't take the bait.

"We'll switch you back on Monday," she said. "I'm glad you had a chance at the promotion and I'm sorry it didn't work out

*Please see **Bad-mouths ...** on Page 2*

Sharpen Your Judgment

What's key to finding the right accommodation?

Hi Lynn, got a minute?" Marcus Pennington asked HR Manager Lynn Rondo.

"Sure," Lynn replied. "Take a seat. What's up?"

"So, you might not know this," Marcus started, "but I have severe allergies. Dust or strong smells can make me gag."

"OK," Lynn said with a nod, grabbing a pen to take notes. "Have you been having issues lately?"

"The past few days," Marcus confirmed. "Lisa has been wearing this really strong perfume that sent me into a bad coughing fit. I had to run outside for fresh air."

Lynn paused. She could try to ask Lisa to cut back on the perfume, but that could cause even more problems.

"If I had my own office with a door, that would solve the issue," Marcus continued.

Doesn't want remote option

Lynn frowned. "We don't have the space to do that, Marcus," she said. "Besides, if we gave you an office, everyone else would want one, too."

"But I can arrange for you to work remotely," Lynn added. "That would help."

"I don't want to work from home!" Marcus insisted. "If you can't give me my own office, I'll have to sue for an ADA violation."

When Marcus filed a suit, the company fought to get it dismissed.

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.

Bad-mouths ...

(continued from Page 1)

the way you wanted.”

A few weeks later Bonnie was on the phone with a longtime customer who said to her, “Hey, what’s going on with Phil?”

Changes made

“Oh, we made some changes again,” she said. “He’s back in his old job. Why?”

“I called him a few days ago to ask about our account, and he said you demoted him because of his age.”

“He said what?” Bonnie exclaimed. “No, nothing like that ever happened.”

“I figured,” the customer said. “You know I was never really happy with how Phil handled our account, and that’s why I complained to you before.”

“You weren’t the only one,” Bonnie said.

Free speech?

When she hung up, Bonnie summoned Phil to her office.

“Did you tell a customer that we demoted you because of your age?” she asked.

“What if I did?” Phil said. “What are you trying to tell me? That you can control what I say? Ever heard of free speech?”

“You could’ve cost us a good

customer by saying that,” she said. “You were way out of line.”

“So I guess you didn’t tell him you hired a younger guy to replace me?” Phil asked.

‘Gather your things’

“That’s it Phil,” Bonnie said. “Please gather your things and go. HR will work out the details later.”

“You haven’t heard the last of me,” Phil told her.

Phil eventually sued for age discrimination and for violating his rights after he was terminated for the conversation with the customer.

He said in court the conversation about his employment was a protected activity.

The firm said the employee was demoted for poor performance and fired for insubordination – disparaging the company to a valued customer.

The firm asked the court to dismiss the lawsuit.

Decision: The

company won when a court tossed out the case.

The judge said there was ample evidence that the employee was demoted for poor performance. Further, the court said bad-mouthing the company to customers wasn’t protected.

Key: Solid documentation of employee performance goes a long way to protect your decisions.

Case: Fox v. Eagle Distributing Co., Inc.

What you need to know:

When you have a problem employee, what can you do to turn things around or prepare for taking action? It all starts with good documentation. Here’s a rundown of key components in good documentation from employment lawyer Jonathan Segal:

- notice that expectations aren’t being met
- an outline of specific failings
- a review of prior counseling sessions
- efforts at discipline and results (or lack of results)
- expectations, and
- what happens if the expectations aren’t met.

TEST YOUR KNOWLEDGE

World of work: No end to the tricky areas you’ll face

Any supervisor or manager with more than a week under their belts knows you need to be ready to address all manner of workplace issues.

Sometimes you’ll have the benefit of time on your hands to come up with the correct answer or approach. Other times, you might have to wing it. Below are three concerns raised by readers, and answers from experts. To test your knowledge, respond *True* or *False*:

1. An employee who is terminated for theft is still eligible for extended health coverage under COBRA.
2. It is an automatic disqualifier for a job candidate who does his (or her) Zoom interview from bed and dressed casually.
3. If you recommend that your employees do completely voluntary online training on their own time, then you don’t have to pay them for that.

ANSWERS

1. *False.* COBRA provides extended health coverage to employees fired for any reason other than “gross misconduct,” says employment law attorney Tzvia Feiertag of the firm Epstein Becker & Green, P.C. Theft would fall under gross misconduct, meaning this person wouldn’t qualify for COBRA.
2. *False.* It’s important to remember that a lot of people are confused about current COVID/Zoom protocols, says management expert and author of *Ask A Manager* blog Alison Green. It’s possible the candidate would’ve dressed completely differently if the interview had been in person, and the bedroom might have been the only available workable space for him.
3. *False.* The DOL says just because training could be done outside of work hours, doesn’t mean it shouldn’t be paid. Even if training is optional, recommending it be completed makes it work-related assignment.

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.

T-Mobile retailer pays \$175K for disability bias

What happened: A sales associate at Northwest Wireless in Spanaway, WA, an exclusive T-Mobile retailer, had a congenital hearing impairment. The employee learned that her store manager told other co-workers that he was tired of repeating himself to her and that he wanted to fire her. She filed an internal discrimination complaint and eventually complained to the CEO/owner of Northwest Wireless, providing written statements from co-workers corroborating the manager's derisive comments. Despite her internal discrimination complaint and her above-average sales performance, Northwest Wireless fired her without warning a month after her complaint.

Decision: The firm will pay the former employee \$175,000 in lost wages, compensatory damages and other relief, and work with the Center for Continuing Education and Rehabilitation at the Northwest ADA Center (operated by the University of Washington) to make its internal policies and procedures more effective under the ADA.

Cite: EEOC v. Northwest Wireless.

Chicago staffing firm hit with \$25K sex bias claim

What happened: LTI Services, LLC, a Burbank, IL, staffing agency which served the northern Indiana and Chicago, refused to hire women for a receiving associate position for one of its clients, Tire Rack. The EEOC said that women who had years

of experience were passed over for men who did not meet the experience or work-history requirements.

Decision: In addition to paying \$25,000, the company will not maintain sex-segregated job classifications and will provide training on Title VII's prohibitions against sex discrimination.

Cite: EEOC v. LTI Services.

Fashion chain wouldn't hire Blacks, Hispanics

What happened: City Sports, a chain of sports fashion stores with over 15 locations in Chicago and the surrounding area, refused to hire and promote African Americans and Hispanics into management positions, and instead favored Koreans to fill management roles. City Sports also subjected two Black sales employees to harassment because of their race, the EEOC charged.

Decision: City Sports will pay \$420,000 to 19 current and former employees and agreed not to engage in race or national origin discrimination or retaliation. The firm must hire a consultant to implement hiring and promotion criteria, and recruiting practices. The consultant will also help implement anti-discrimination policies and procedures for investigating discrimination complaints. City Sports must also provide anti-discrimination training and report to EEOC on management selection and complaints of discrimination and harassment.

Cite: EEOC v. City Sports.

STOP, LOOK, LISTEN ...

The hidden challenges remote teams are facing

The remote revolution taking place during the COVID-19 pandemic has changed how teams operate for good.

As so many employees say they want the option to work remotely for the rest of their careers, companies now need to find sustainable and efficient ways to support the transition.

The problem, however, is that the change in workflow has meant teams are facing issues around communication, prioritization and alignment.

On top of that, remote teams are at risk of feeling isolated and disconnected from the wider company strategy and culture.

Here are keys to address challenges faced by remote teams using Objective Key Results, or OKRs:

Maintaining communication

At their core, OKRs are about setting collective goals that everyone agrees on and understands how to achieve. Especially when functioning at a distance, when employees can feel unfamiliar with new processes, OKRs tie everyone together.

Prioritizing tasks

A study from McKinsey found only 52 percent of respondents believe that how they spend their time matches with their organization's priorities. When working remotely, this figure could be even lower as being away from the office and colleagues makes it difficult to focus.

Keeping aligned

OKRs tie strategy and execution together, and are the vehicle for vertical alignment throughout organizations. With objectives in black and white, teams' OKRs make business goals transparent for everyone at the company. This transparency is what seeds collaboration and exposes areas that are redundant, ultimately helping teams to save time and money.

For more, go to: <https://www.hrmorning.com/articles/challenges-remote-teams-face/>

SUPERVISORS SCENARIO

Supervisor said he'd discipline harasser, but victim quits anyway – what went wrong?

Boss promised to 'put an end to it'

Dawn set her resignation letter on Steve's desk.

Before he even picked it up, he asked, "If this is about your harassment complaint against Tony, we should talk."

"It's about a lot of things," she said. "Tony is only one of them."

"Then let me deal with Tony," Steve said. "I'll put an end to it and he won't harass you any more. Then will you stay?"

"Let's say we forget about it," she said. "You disciplined him once. And you told him if he said anything else to me again, he'd be fired."

"Well, he kept it up and you didn't fire him, so it's time for me to move on."

"I wanted to get rid of him then and there," Steve said. "But I don't have a good replacement. Why don't you stick it out a little longer here? Give it another shot?"

"My mind is made up," Dawn replied. "In fact, to be honest with you, I started interviewing right after I realized you weren't firing Tony. I'm pretty sure I have something good lined up, too."

"Well, if that's the way you're going to handle this, maybe you should leave," Steve said sharply.

No choice but to quit

With that, Dawn did leave. Then she filed a lawsuit charging that Steve didn't do enough to stop the sexual harassment, which left her no choice but to quit.

The firm argued the supervisor did make reasonable efforts to stop the harassment, including discipline and a promise to take further action. They said the employee left for greener pastures.

Decision: The firm lost. A judge ruled the key point was the supervisor failed to follow up and fire the offending harasser. Whether the employee had a job waiting had no bearing on her ability to tolerate conditions at work.

Key: An unkept promise or empty warning can be deadly ammunition in court. If you make a promise to deal with a problem, you're obligated to stick to it.

Case: Engel v. Rapid City School District.

What you need to know:

When you receive a complaint about harassment, of course you'll want to take action. And it's important to know what action you'll take before making any promises.

- Get with HR to see how these situations have been handled in the past with others. The discipline should be consistent with what's been done before.
- Once you settle on a course of action be prepared to follow through and follow up. Anything less can make it look like you're favoring the harasser.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

Yes. The company won when a judge dismissed the lawsuit.

Marcus' attorney argued that the company didn't engage in the ADA interactive process because it refused to grant Marcus' preferred accommodation.

But a court disagreed.

It said the company did engage in the interactive process – Marcus was the one who brought the process to an end by refusing to consider remote work.

The court went on to say that Marcus had no good reason as to why working from home wouldn't be feasible for him.

"The plaintiff's unwillingness to explain the

rejection was inconsistent with the flexible give-and-take necessary for finding an effective accommodation," the court said.

Accommodation is a joint effort

This case offers an important reminder that employers don't have to give employees their preferred ADA accommodation.

The ADA simply requires an accommodation that is effective for both parties.

Employers have to show a good-faith effort to accommodate the employee, and a good way to do that is to request more info about the worker's condition and consider all accommodation requests seriously.

Cite: Ali v Scott Pruitt

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