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January 18, 2021

OUR TOP STORY

Boss's promotion pick lands him in court facing bias lawsuit

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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

COVID-related questions at work

Disability claim costs firm \$115K

Good messaging boosted sign-ups

Workers tangle over religion

Boss never even gave her a shot at the promotion: Is that bias?

She had the education and skills; so what really happened?

“I just heard that you picked someone for the promotion,” Gina Waters said to her supervisor. “And it wasn’t me!”

“Correct, I decided to give the promotion to Todd,” Randy replied.

“And I have to tell you, I’m really amped up about it,” he added. “I think Todd is perfect for this. He’ll do a great job.”

“Oh, I’m sure,” Gina said. “And trust me, I don’t have anything against Todd. But I know I’m a better choice.”

“I have a better education than Todd does, and I have a stronger background and solid skills.”

“I must say, I am perturbed that you didn’t even interview me,” she said, “especially since I was the only woman suited for that job.”

Up to her ears in work

“Wait now,” Randy told her, “we were at the tail end of the interviewing when you threw your hat in the ring.”

“Why didn’t you get in sooner?”

“I was up to my ears in work,” Gina said. “You know that. I had that out-of-town conference to plan for. I was working my

Please see Promotion... on Page 2

Sharpen Your Judgment

Boss had to defend his remark about pregnancy

Vince listened to the question from Rob, the HR manager, and then replied: “Yes, I did tell Anne to ‘be careful’ about getting pregnant.”

“Another employee had already left to have a baby, and I was just trying to explain that our staffing bind would get a lot worse if she got pregnant, too.”

“Which of course she did,” Rob added.

“Right,” Vince nodded. “Then to top it all off, when I asked Anne to come in early because of the crunch, she said she couldn’t because of morning sickness. That’s when I nearly lost it.”

“That’s pretty much what she told me,” Rob explained. “What else happened?”

“I just turned around and walked to my office,”

Vince said. “She followed me and said, ‘What’s your problem?’ But I refused to get sucked into it.”

Just expressing a concern

“That’s about how Anne described it,” Rob agreed. “But she got the impression you were going to get tough with her because she’s pregnant.”

“I never said anything like that,” Vince insisted.

Anne quit and then sued for pregnancy discrimination over Vince’s “be careful” remark.

The company said Vince had just been expressing concern about the staffing problem and its effect on business, and that nothing he said or did amounted to pregnancy discrimination.

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.

Promotion ...

(continued from Page 1)

tail off ... and a lot of good that did me, huh!"

Disappointed

"I understand you're disappointed," Randy said. "But we had the position open and posted for a good while.

"Both Henry and Todd knew to jump in as soon as it was posted."

"Henry?" Gina said. "He applied for it, too?"

"Yes, and I actually offered him the job first," Randy explained.

"But Henry thought it over for a while and said he changed his mind. He didn't think it would be a good move for him.

"So I offered it to Todd next."

"But I am more qualified than both of them," Gina said.

"How could you not even consider me, after all this time I've been here?"

Thought she was happy

"As I said Gina, I know you're disappointed," Randy said.

"I always thought you were very happy with what you were doing. You threw yourself into that conference and did a great job with it.

"Had I known you were interested ..."

"I never thought my own company would discriminate against a woman like this," Gina interrupted.

No shot

"Discriminate!" Randy echoed.

"Yes, don't you normally go back and review all the resumes when a candidate turns you down?" she asked.

"Well, usually, yes," Randy said. "But I already knew Todd would be my second choice so I didn't feel

the need to go over all those resumes again.

"See, you could've given me a shot at this, but you decided not to."

"Gina, I thought you were happy where you were," Randy said.

Gina ended up hiring an attorney and suing the firm for gender bias.

The company said it never considered Gina for the promotion because she never said she was interested.

Decision: The firm won when a court dismissed the case.

The court said it may have been out of the ordinary for the firm not to review the resumes a second time, but that didn't suggest gender bias by the supervisor.

Key: Always make promotion decisions based on qualifications and then document your reasons.

Case: Eason v. Del Monte Foods.

What you need to know:

Even the most diligent managers can fall prey to unconscious biases when hiring or promoting. That's why it pays to:

- **Focus on metrics.** Numbers can be helpful in eliminating bias from decision-making.
- **Solicit 360-feedback.** Instead of giving one person the ability to rate employees' performance or choose which employee is promoted, a diverse group of people should come to a consensus, if possible.
- **Stick to the process.** If your company conducts internal interviews before making a selection for a promotion, then it's best to stick to that practice every time a position comes up.

TEST YOUR KNOWLEDGE

Tricky COVID-related questions firms face

COVID-19 has turned the workplace on its head, and seriously increased the level of challenges HR leaders must face.

Here are three pressing issues recently faced by our readers.

To test your knowledge, respond *True* or *False* to the following:

1. We have at least one employee who has plans to travel out of state. It's perfectly OK for me to require them to quarantine for two weeks when they return.
2. We have an employee who has breastfed her baby several times during Zoom meetings, and it's bothered some employees. We are within our rights to tell her not to.
3. Even though the CDC has shortened the length of the recommended COVID quarantine, it's OK for us to require 14 days.

ANSWERS

1. *False.* Since some states prevent employees from restricting employees' personal travel, it's safer not to do that, says employment law attorney Todd Scherwin, of Fisher Phillips. However you can require traveling workers to get a COVID test before returning to the workplace. It's important to note that you may have to pay for that test.
2. *True.* Generally that's OK, but it depends on how exposed she is on camera, says *Evil HR Lady* blogger Suzanne Lucas. If the employee is exposed for long periods, that might be an issue. But, if all you see is a baby's head, just let it be.
3. *True.* Employment law attorney Fiona Ong notes the revised guidelines still say the 14-day quarantine is the safest way to go. However, the CDC now says if an exposed person receives a negative COVID test, they can end quarantine after seven days and after 10 days with no test.

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.

Consultant out \$37.5K for national origin bias

What happened: Blackstone Consulting Inc., Silver Spring, MD, which provides environmental, facilities management and other services to clients, hired a woman from El Salvador, who had limited English-speaking skills, as a part-time cleaner. Blackstone interviewed and trained her in Spanish and assigned her to work with a Spanish-speaking supervisor and co-worker at a client site in Hyattsville, MD, where she performed her job satisfactorily.

Later, a manager made a derogatory comment to her about Hispanics, and said, “How is it that you do not know how to speak English? In this company you are not allowed to work here if you don’t know how to speak English.” The manager terminated her and told her she could have her job back if she learned to speak perfect English in 30 days.

Decision: Along with paying \$37,500, Blackstone will implement acceptable English proficiency requirements and refrain from firing employees based on their national origin.

Cite: EEOC v. Blackstone Consulting Inc.

SW homebuilders pay \$70K for sex harassment

What happened: A female employee was repeatedly subjected to unwelcome and offensive sexual advances by the owners of Desert Truss,

Inc., a construction supplies manufacturer based in Arizona, and Buttrum Construction, Inc., a home building company based in New Braunfels, TX.

After she repeatedly complained about the unwanted behavior, she was fired.

Decision: The two firms agreed to pay \$70,000 to settle the EEOC’s sexual harassment and retaliation lawsuit.

Cite: EEOC v. Desert Truss, Inc. et al.

Health group settles disability claim for \$115K

What happened: Aspire Health Partners, a behavioral health care group in Orlando, FL, terminated a 20-year employee after she exhausted medical leave taken due to a workplace injury. The employee’s doctor cleared her to work without restrictions shortly thereafter, and she applied for a position within Aspire’s Village House program.

However, just hours before her interview, the former employee was notified that she was ineligible for rehire at Aspire due to medical records in her prior workers’ compensation file.

Decision: In addition to paying \$115,000 in damages, the consent decree settling the suit requires Aspire to adopt and distribute an updated policy against disability discrimination; conduct training on disability discrimination for its human resources officials; and post a notice.

Cite: EEOC v. Aspire Health Partners.

STOP, LOOK, LISTEN ...

Good messaging boosted open enrollment efforts

As we approached our 2020 open enrollment, we were preparing to transition to new benefit carriers for the first time in two decades, including a new medical plan administrator and prescription drug provider.

As part of the transition, it was critical for all of our employees to actively enroll for 2020 benefits. “Same as last year” wasn’t an option.

Our HR team had to ensure our people were aware of the changes and reassure them the changes would cause little to no disruption.

The team developed a communication strategy to educate employees about changes, help them weigh options – and drive them to enroll by the deadline.

We created an open enrollment brand, “Benefits = Coverage You Can Count On,” to showcase all the ways our benefits make employees’ lives better. Math references throughout the campaign (equal, count, etc.) tied in to our company’s actuarial roots.

Our communications approach included the following tactics:

- Promote the positive: Reassure employees their doctors would still be in-network and healthcare costs weren’t increasing.
- Keep it conversational: Use friendly, casual language to pull in employees.
- Inspire action: Include a clear call to action, and design messages for different reading styles.
- Repeat to retain: Maintain key messages in all our materials.
- Reward early action: The earlier employees confirmed their elections, the more chances they had to win healthy prizes.

Engagement exceeded our expectations, with 96% of employees enrolling by the deadline. They made it clear they found the campaign helpful.

Contributed by: *Jennifer Bolton, Sr. Communication Consultant, MillimanBenefits.com*

SUPERVISORS SCENARIO

Religious beliefs cause friction between co-workers: What’s supervisor to do?

Diversity policy gets put to the test

Glenn stopped suddenly when he saw the sign tacked to Sam’s cubicle wall: *Gays are followers of Satan and should be shunned by all.*

He studied the sign for a moment and then said, “Sam, come into my office for a few minutes, please.”

After they were both seated, Glenn began: “Didn’t I give you a copy of our diversity policy and warn you about posting signs like that?”

“You did,” Sam answered.

“Then what’s the deal?” Glenn said. “You know you can’t continue with that stuff. It’s a direct violation of the policy, and besides that, it makes for an uncomfortable work situation with a couple of people here who are gay.”

The Bible says ...

Sam pulled out a small copy of the Bible and said, “Here’s my policy. It dictates that not only should I not tolerate gays, but that I also should condemn them. It’s called freedom of religion, Glenn.”

Glenn just nodded.

“I totally respect your religious beliefs, but there’s something you have to understand,” he said. “They’re your beliefs, and I can’t supervise people according to those beliefs. We have a business to run here.”

Sam held firm. “I’m obligated to follow my religious beliefs, no matter what you have to say.”

“That means this can end only one way,” Glenn explained. “I’m going to have to let you go.”

He did so, and Sam sued for religious discrimination. The company’s counter argument was that Sam was defying policy and creating a disruption to business.

Decision: The company won. A judge ruled the employee couldn’t justify his actions by claiming religious freedom.

Key: The supervisor framed the argument as a business decision and an obligation to follow fair and legal policies designed to encourage cooperation.

Case: Peterson v. Hewlett-Packard Co.

What you need to know:

Courts try to give employees wide latitude in religious practices such as time off for the observation of Sabbath days.

However, supervisors are not obligated to condone or overlook religious-based behavior that:

- creates a disruption to business
- exhibits open hostility toward other employees based on, for instance, sexual orientation, or
- is in violation of a stated and approved company policy that must be followed by other employees.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

Yes, the company won when a judge dismissed the case.

True, the supervisor had shown himself to be less than thrilled about the employee’s pregnancy. No one disputed that.

What was in dispute was the potential of the supervisor to treat the employee unfairly because she was pregnant. The employee tried to argue that the supervisor’s statement and short temper were evidence that he was going to make it rough on her.

The judge said no to that argument.

At no time had the supervisor indicated he would treat the pregnant employee any better or worse than he had when she wasn’t pregnant.

As for his frustration about her not coming in early: That was nothing more than a reaction to business difficulties, too.

What’s open for discussion

Of course, the last thing you want to say to an employee is, “Don’t get pregnant.” That would present a legal risk, as well as problems with morale and management.

You can, however, discuss the business effects caused by the pregnancy, just as you would with any other extended absence: changing schedules, workloads, responsibilities and so on.

Case: Fjelsta v. Zogg Dermatology

EDITOR: RICH HENSON

ASST. EDITOR: RACHEL MUCHA

MANAGING EDITOR: TOM D’AGOSTINO

PRODUCTION EDITOR: PJ FRONZEO

EDITORIAL DIRECTOR: CURT BROWN

Subscriptions: 800-220-5000

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