

# Supervisors

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February 1, 2021

### OUR TOP STORY

**Worker said he was fired for being a whistleblower**

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6-point checklist to document better



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7 questions to ask yourself before deciding whether to fire someone



### INSIDE

**What to say when disciplining**

**Restaurant didn't stop harassment**

**Help burned-out remote workers**

**Age remark gets boss in hot water**

## Troublemaker says he's a victim: Key steps to take next

*What's over the line when employees complain too much?*

Supervisor Nancy Walker couldn't help but notice that everyone was shutting their laptops or shielding their phones as she walked by unannounced.

"I'm guessing you've all read that email by now," she said to no one in particular.

She stopped at Joe Watson's desk.

"I need to see you for a few minutes," she said to him.

Joe stood, straightened his shirt and followed Nancy down the hall.

"What were you thinking when you sent that email to everyone?" Nancy asked, as she closed her office door behind them.

"Was that a mistake, or did you intend to copy everyone on it?" she asked.

### Want to get fired?

"That was no mistake!" Joe said firmly. "I'm sure everyone is interested in knowing why you're out to get me. You never know ... any one of them could be next.

"I just wanted to put it in writing."

"You mean you want to get yourself fired," Nancy said. "Didn't I tell you very clearly that you are not to send any more of these accusatory, rambling emails to

*Please see Troublemaker ... on Page 2*

### Sharpen Your Judgment

## Are job candidates protected under the FLSA?

"When's Karen's first day?" asked Supervisor Greg Dobbins. "We sure can use her."

"Karen's not having a first day," replied HR Manager Cindy Smith.

"I just got off the phone with her. I told her she didn't get the job."

"What do you mean?" Greg asked.

"She nailed the interview and was without a doubt the best candidate.

"She was perfect!"

"Except for the fact she sued her last employer for FLSA violations," said Cindy.

"It's a good thing we ask people background questions.

"We can nip problems like this in the bud. We can't afford to deal with that stuff," Cindy said.

"How did she take it?" Greg asked.

### Retaliation?

"Not so well," Cindy said.

"She said we were retaliating against her for making an FLSA complaint, by using it as a reason not to hire her.

"She said the FLSA still protects her, and we can't deny her a job because of it," Cindy said.

"Can she do that?" Greg asked.

"She's suing us to prove she can," Cindy said.

Was the firm able to get the case 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.*

# Troublemaker ...

(continued from Page 1)

everyone in the company?

"I just can't believe you did this again! You're begging to be fired."

## Cursed at a manager

"I've been here long enough to know you don't get things done unless you 'cc' everyone," Joe said.

"Like when I had problems with my health insurance and HR wouldn't do anything until I emailed the entire building," he said. "Then it got done."

"You've dug yourself a big hole this time," she said to him.

"Two months ago you sent everyone an email accusing me of being out to get you because I had to discipline you for cursing at a manager," she said.

## Blew the whistle

"Oh come on, who were you trying to kid with that?" Joe said.

"Everybody curses around here. Admit it, you've been out to get me ever since I blew the whistle on Karen for forging those vendor accounts.

"You and Karen were good friends, and ever since she got fired, you've been trying to get me fired, too."

Nancy stood and looked Joe directly in the eyes.

"You know what Joe?" she said. "You've made your bed and now you're just going to have to lie in it.

"I've bent about as far as I can with you," she said.

"I'm going to escort you to your desk to pack up, and then out the door. You're fired."

## Whistleblower complaint

After he was fired, Joe sued the company.

He claimed his firing was in retaliation for his blowing the whistle on a co-worker who was stealing from the company.

He said firing him was a violation of public policy because he had a duty to expose illegal behavior.

The firm said the employee was let go for repeatedly violating company rules, including sending "broadcast emails" that contained inaccurate and disparaging information about the company and

Joe's direct supervisor.

**Decision:** The firm won when a court dismissed the case. The judge said there was no real evidence to link his firing to his having reported a co-worker for theft.

**Key:** The firm got a favorable ruling in part because it had documented behavioral problems with the employee before dismissing him.

Case: *Markosyan v. Citizens Financial Group.*

### What you need to know:

Employers cannot fire or discipline an employee for doing something that is a protected activity either by statute or constitutional right.

This includes:

- Firing an employee for exercising their legal right to vote
- Firing an employee who has refused to commit an illegal act
- Firing an employee because they reported illegal misconduct by a co-worker, and
- Firing an employee for reporting alleged unlawful conduct by the employer.

## TEST YOUR KNOWLEDGE

### Discipline warnings that stand up to legal scrutiny

Issuing warnings over an employee's performance or behavior is a key part of being a supervisor. And it pays to learn to do it the right way, so that your discipline decisions stick.

To test your knowledge of what types of warnings are legal and effective, respond *True* or *False* to the following:

1. This type of wording for a warning is effective and legal: "If you improve your performance in the next 60 days, we will take you off probation."
2. In all instances, an employee must be issued a warning in writing, and a chance to change, prior to any termination proceedings.
3. If you issue a warning to an employee who refuses to sign or otherwise acknowledge the warning, it's still in force and still can be used as a basis for further action, including termination.

## ANSWERS

1. **False.** Here's the problem with it: Suppose an employee does improve over the time period, and then immediately reverts to the prior level of performance or behavior. Then you're stuck with a promise about taking the employee off probation.
2. **False.** Unless your company has specific policies or union agreements, employers can fire without prior warnings. Common examples of causes of immediate termination would be acts of violence or safety violations.
3. **True.** An employee can't escape the consequences of a warning just by refusing to sign it. If refusal does happen, make a note of it on the warning and make sure HR has a copy.

### Answers to the quiz:

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# 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.*

### **Indiana town pays \$80K for disability bias claim**

**What happened:** The city of Hammond, IN, subjected employees to impermissibly broad and comprehensive medical exams, which they called Functional Capacity Evaluations. The city used the results of this medical inquiry to terminate at least one individual. These actions were in violation with the requirements of the Americans with Disabilities Act.

The ADA also prohibits employers from engaging in retaliation because an employee opposed discrimination or filed a charge with the EEOC. It is also unlawful to coerce, intimidate, threaten or otherwise interfere with an individual's exercise of ADA rights, or with an individual who is assisting another to exercise ADA rights.

**Decision:** The city chose to resolve the matter by paying \$80,750 to settle the claim. It also agreed to provide written guidance and training to managers and supervisor, along with training on the ADA to the appropriate staff.

**Cite:** EEOC v. City of Hammond, IN.

### **Food distributor pays \$5M in gender bias lawsuit**

**What happened:** Performance Food Group, Inc. (PFG), of Baltimore, a national marketer and distributor of proprietary branded food and food-related products, engaged in an ongoing pattern of failing to hire a class of female applicants for operative positions at its Broadline brand facility.

The EEOC also charged that PFG failed to promote a qualified female employee into the position of nighttime warehouse training supervisor at its Carroll County Foods facility in Maryland based on her sex.

**Decision:** The settlement requires PFG to pay \$5 million to the female applicants who were not hired and \$75,000 to the female worker who was not promoted. The consent decree enjoins PFG from failing to hire women to selector or driver positions because of their gender and from engaging in retaliation.

**Cite:** EEOC v. Performance Food Group, Inc.

### **Restaurant didn't stop sex harassment, pays big**

**What happened:** A dishwasher for the restaurant group known as 1618 Concepts, Greensboro, NC, complained to managers about being sexually harassed by a male co-worker, including repeated touching. The lawsuit alleged that despite the employee's complaint, the harassment continued and the worker had no choice but to resign as a result of the conduct.

**Decision:** Along with paying the employee \$30,000, the restaurant agreed to conduct annual training for its employees, supervisors, and managers on the requirements of Title VII and its prohibition against sexual harassment in the workplace.

**Cite:** EEOC v. 1618 Concepts, Inc.

## STOP, LOOK, LISTEN ...

### **Recognize and help those burned-out remote workers**

Almost 70% of remote employees experienced burnout symptoms while working from home during COVID-19, a recent Monster.com survey found.

Working from home was once thought to be the ultimate perk. Now it's a pain for people displaced from the office in 2020.

The longer some employees work from home, it seems, the more stressed, disconnected and unsettled they become.

So it's important for HR leaders and frontline managers to help remote employees avoid and recover from burnout.

#### **4 keys to focus on**

Some signs that remote employees are burned out are the same as those employees showed when they worked on-site. They avoid work, perform less, become apathetic, grow irritable more easily and, oddly enough, resist taking time off. It pays to encourage:

**Boundaries.** You can't dictate how employees set up their remote work environments. But you'll want to remind them to set boundaries between work and life. Ideally there's a physical one – a door or curtain between where they work and the rest of their home. If not, tell them to create mental boundaries every day – put work tools (computer, papers, references, etc.) away, go outside or take a short ride for a space of time between work and life.

**Limits.** Remind employees to turn off email notifications and other professional alerts when they aren't working.

**Involvement.** Remind them to schedule activities they enjoy – just like they schedule work hours and meetings. They might want to get more involved in their hobbies, volunteering, wellness and family activities.

**Concentration.** Be as flexible as you can so employees can focus intensely on their duties during hours that work best for them. That way, they feel released from work and focus on life at other times.

## SUPERVISORS SCENARIO

# Older employee bases bias claim on comment supervisor made earlier: Can he make it stick?

*Boss joked older employee was probably too tired to go to happy hour*

“Big plans for the weekend, or are you just gonna take it easy?” Supervisor Jon Parker asked.

“What’s that supposed to mean?” Glen Taylor replied.

“Nothing at all,” Jon said. “What? Is something wrong?”

“Yeah, I think I got shortchanged when you reassigned us all today,” Glen said. “It’s pretty obvious the ‘old guy’ got the shaft this time around.”

“The old guy?” Jon asked.

## Dumb joke?

“That’s a direct quote, from you,” Glen said. “Don’t you remember? You were there, too.”

“You were rounding up folks to go to happy hour and you pointed at me and said, ‘I think the old guy’s too tired to go drinking. He probably needs to go home and get some sleep.’”

“Oh my, that was a joke, a dumb one, too,” Jon said.

“Then you aren’t denying that you

singled me out because of my age,” Glen stated. “And now I get the crappy assignment. This isn’t fair.”

“You’re not the only one who’s unhappy about these changes,” Jon assured him.

A little while later, Glen quit. Then he sued the company for age discrimination, saying his last assignment amounted to an adverse action, and that the reason he got that assignment was his age.

The firm tried to get the case dismissed, saying the supervisor was only guilty of a single, stray remark.

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

The judge found that the supervisor’s comments were made much earlier and not in connection with the reassignment.

Also, the court noted, a number of employees were affected by the change in a negative way, so it didn’t appear to be a single adverse action taken against only one individual.

*Case: Zivkovic v. Juniper Networks, Inc.*

## What you need to know:

A stray remark refers to a discriminatory statement that someone makes about another in the workplace that influences a major employment decision like hiring, firing, or wage determination.

For example:

- A male employee says a female co-worker is too emotional
- A younger employee comments on how an older co-worker is clueless about social media, and
- An employee makes a mocking comment about a co-worker’s religious beliefs.

## Sharpen Your Judgment – THE DECISION

*(continued from Page 1)*

The company won when a court dismissed the claim.

The company’s request for dismissal was granted on the grounds that the FLSA anti-retaliation provision “protects only employees, not prospective employees.”

A federal appeals court upheld the ruling.

### Employers take caution

Legal experts caution employers elsewhere to take this with a large grain of salt.

That’s because it can’t be interpreted as a precedent-setting ruling.

There’s no guarantee a company contesting a similar case in another jurisdiction would prevail.

One reason: This case drew the attention of the U.S. Department of Labor (DOL).

The DOL weighed in, filing a brief supporting the job applicant and sending an attorney to argue her cause before the court.

This is significant because many other jurisdictions take their cue from positions taken by government agencies such as the DOL.

Employers might want to keep this in mind if they’re considering not hiring someone just because of a previous FLSA complaint: You’re unlikely to be as fortunate as this company was.

*Cite: Dellinger v. Science Applications International Corp.*

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