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March 15, 2021

OUR TOP STORY

Avoiding bias suits when handling discipline

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7 questions to ask yourself before deciding whether to fire someone

INSIDE

Performance talks face-to-face

Disability bias costs firm \$85K

How to help your senior workers

Boss dragged into court for age bias

Are you applying the rules evenly, or opening the door to a bias suit?

Female employee said supervisor was just out to get her

“Gina, you can’t keep putting those boxes down right there,” Supervisor Ralph Cosby yelled.

“I’ve told you that a thousand times,” he barked.

“Now, don’t get your blood pressure up,” Gina said. “I’m only leaving them here for a couple minutes. It’s not like it’s hurting anything.”

“It’s a safety violation,” Ralph said sharply. “Those boxes cannot be left there; not for one minute, not even for a few seconds. Got it!”

“Now move them to where they belong,

or I will write up right now.”

“You’re kidding, right?” Gina said. “Why are you always threatening me with discipline for this little stuff when you let the men get away with murder?”

Picking on a woman?

“Oh, it’s not a threat,” Ralph assured her. “Now move that stuff.”

“Hold on one second,” Gina said. “If I was any of the guys you wouldn’t care less where I put these boxes. You’re picking on me because I’m a woman.”

Please see Rules evenly ... on Page 2

Sharpen Your Judgment

They’re all paid the same, so what’s illegal?

“It’s looking like the most recent three job changes you made in your area are causing some really heated commotion,” HR manager Denise Lutrell said.

“Why?” asked supervisor Brady Hall.

“The three people you reassigned all complained that the jobs you put them in are dead ends, that their assignments mean they’re going nowhere in this company,” Denise explained.

“Well, maybe they’re not,” Brady said. “But I did make sure that they get the same pay as everyone else,” he added.

“Yes, you did,” Denise said. “But it’s not always just about the money. I’m sure you are aware those are all three minority employees.”

Brady sighed.

“Look, I made sure that everyone is paid equally,” he said. “Now you’re telling me I have to make sure they like their jobs, too?”

Plums and lemons

“No, but you do have to pay attention to who gets the assignments with the brightest future,” Denise said, “and why.”

“Everyone here knows which jobs are plum assignments, and which are lemons,” she added.

One of the three employees sued the company for discrimination. The firm said in court the employee suffered no adverse effects since the pay was the same as other jobs.

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.

Rules evenly ...

(continued from Page 1)

“That’s got nothing to do with it,” Ralph replied. “Those guys have been around a lot longer than you and they’ve proven they know what they’re doing.”

“But rules are rules, remember?” Gina said. “If they apply to me, they should apply to everyone.”

“We’ll talk about this later,” Ralph said. “Now back to work.”

First thing the next morning, Ralph handed Gina a discipline notice with her name on it as she walked in the door.

“You showed poor judgment in setting those boxes where you did yesterday,” Ralph said.

“Frankly, I’ve lost confidence in your ability to work safely and follow rules.”

Gina looked at Ralph with great surprise.

Why be so difficult?

“Ralph, you know darn well I left those boxes there for a few minutes because it’s easier than moving them three times.

“And you know where I learned that shortcut from? The same guys whose unsafe behavior you ignore.”

“Why are you being so difficult about this?” Ralph said. “That’s one of the other ongoing problems I have with you that we’ve talked

about.

“You won’t take responsibility for you own actions.”

Was she treated fairly?

“And one of the problems I have with you,” Gina challenged him, “is that I don’t think you treat me the same way you treat the men.

“This discipline notice is just more proof of that.”

Ralph followed up his disciplinary action by demoting Gina and docking her pay.

That spurred Gina to hire an attorney and sue her supervisor for gender bias, claiming she was treated more harshly than her male co-workers for the same violations.

The firm asked the court to dismiss the case.

It acknowledged it was not normal practice to demote an employee and dock their pay for a safety violation, but the supervisor had lost confidence in the employee’s

ability to work safely.

Decision: The firm lost when a jury awarded the worker \$55,000 for emotional distress and punitive damages.

After reviewing the supervisor’s disciplinary records for safety violations, the jury found evidence of “inconsistencies and contradictions.” That was enough to cast doubt on the firm’s case.

Case: *Lundien v. United Airlines.*

What you need to know:

Naturally you can and should enforce workplace safety, as well as other standards. And when you must resort to discipline, doing it right the first time prevents others from turning the tables on you.

That why it always pays to follow these three simple steps to avoid getting into legal hot water:

- Review files to see how similar offenses were handled in the past
- Adhere to disciplinary guidelines based on the gravity of the offense, and
- Work closely with HR to be sure you are doing things correctly.

TEST YOUR KNOWLEDGE

Keys to discussing poor performance face to face

One of the tougher situations supervisors face is sitting down with someone to discuss poor performance or breaking the rules.

To test your knowledge on the best ways to handle difficult conversations, respond *True* or *False* to the following:

1. Keep a tight grip on the agenda – don’t give people an opening to rant or ramble. You’ll go off course.
2. At the early stage of a minor conflict between two employees, you first should give them a chance to work things out without your intervention.
3. A situation has gotten to the point where you’re involved in settling a dispute between two employees.

You should get the two of them in a room together with you, and encourage them to hash out the issue while you mediate.

ANSWERS

1. *False.* While it’s important for a supervisor to identify the purpose of the meeting and keep it on track, it’s OK to allow people to vent. Then, the supervisor can guide the conversation back to the topic.
 2. *True.* You shouldn’t have to jump in immediately and settle every conflict. Tell the warring sides you’re going to give them the chance to settle things and move on – and if they don’t, you will.
 - Note: There’s one exception: If you reasonably believe that someone’s safety is at risk or violence is likely, then you’re obligated to intervene right away.
 3. *False.* That’s an invitation to further the argument and engage in finger-pointing.
- First, speak to them individually and see if you can settle things using that approach.

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.

FL firm pays \$85K to settle disability claim

What happened: Pirtek USA LLC, a fluid power system company based in Rockledge, FL, violated federal law by firing an employee because of a perceived disability.

In late 2015, the employee was hospitalized for several weeks with pancreatitis, acute respiratory distress syndrome and pneumonia. In March 2016, the employee's physician cleared him to return to work without restrictions. Nevertheless, Pirtek fired him, claiming that he was a "liability" and that it was afraid he would get injured on the job, the EEOC said.

Decision: Pirtek agreed to settle the claim for \$85,000 and also to develop and distribute a written policy against disability discrimination and to conduct anti-discrimination training for management and human resources personnel.

Cite: EEOC v. Pirtek USA.

MI restaurants pay big for sexual harassment

What happened: The owner of Georgina's LLC, and its successor, Anthony's Little G's, Traverse City, MI, repeatedly made lewd sexual comments to a female sous chef. The agency alleged that when the sous chef complained to a manager, the owner stripped her of authority in the kitchen and changed her schedule; 10 minutes later, the owner fired her.

Other female employees were subjected to offensive conduct by the owner, including

inappropriate touching, being kissed without consent, and being subjected to continuous comments about how he wanted to have sex with them.

Decision: The firm agreed to pay more than \$200,000 in back pay and compensatory and punitive damages to settle the claim.

Cite: EEOC v. Georgina's LLC.

LA firm settles pay equity claim for \$400,000

What happened: The managers of Aimbridge Hospitality, LLC and AH 2007 Management, LP, which once operated a Courtyard by Marriot in Monroe, LA, paid a male guest service representative \$15.25 per hour while paying a female front desk supervisor and female guest service representatives \$11 or less per hour.

Aimbridge eventually began paying the female supervisor \$16 per hour, but unlawfully reduced the pay rate of the male representative rather than increasing the pay rates of the female representatives, as the law requires, the EEOC charged.

Decision: The firm agreed to pay \$400,000 to settle the claim, which included providing back pay and other damages to the female front desk supervisor, the female guest service representatives, and the male guest service representative, whose pay rate Aimbridge reduced. The decree also requires Aimbridge to conduct periodic training on pay discrimination.

Cite: EEOC v. Aimbridge Hospitality.

STOP, LOOK, LISTEN ...

Older workers are sticking around: What HR can do

One of the factors that gets workers 65 and older thinking about retirement is fatigue from decades of commuting to work.

However, with a work-from-home "new normal" courtesy of the coronavirus pandemic, commutes are, for now at least, a thing of the past.

Even though many older workers opted to retire at the beginning of 2020, the number of age 65-and-older workers has since rebounded, according to the Bureau of Labor Statistics.

The comfort of working from home may be giving them a second wind to keep working.

Other reasons

Another reason to keep working: to stay mentally and socially engaged.

The curtailment or cancellation of events and activities because of COVID-19 has reduced the possible pursuits for retirees that don't involve work.

Also, data suggests some older employees are still working to bolster their retirement assets.

According to Fidelity Investments, the average Individual Retirement Account balance in the third quarter of 2020 for people over 60 was a little more than \$200,000.

Lots of upside

A workforce delaying retirement can be beneficial to employers.

It means less turnover, while keeping an experienced and knowledgeable staff, which can increase company stability and customer satisfaction.

HR can support older workers by reviewing job descriptions with their managers and consider redesigning their jobs to include mentoring or coaching less experienced employees.

Another option is pointing them toward financial education resources that address their needs.

SUPERVISORS SCENARIO

Zero-tolerance rule on discipline leads to age discrimination lawsuit

Keys to keeping your cool when ‘refereeing’ employee squabbles

“How dare you talk to me that way,” Tanya exclaimed. “And you pushed me! Keep your hands to yourself.”

“I didn’t really push you,” Peter said. “I bumped you, and it was incidental.”

“But I raised my voice with you because I was angry after you embarrassed me in front of everyone,” Peter added. “You blew my little error way out of proportion.”

“Maybe I could have been easier on you,” Tanya said, “but that didn’t give you the right to call me a b— in the hallway,” she said.

“You’ve worked here a long time,” Tanya said. “And at your age I expect you to be able to handle constructive criticism without attacking your supervisor.”

Witnesses confirm

Later, Tanya reviewed the incident with her HR manager, Julie Potts.

“Everyone saw what Peter did and heard what he said,” Tanya explained. “I hope you won’t let him off easy.”

Julie met with Peter later that same day.

“All the witnesses confirm Tanya’s description of what happened,” Julie told him.

“You are well aware that we have zero tolerance for this kind of name-calling and we don’t tolerate pushing and shoving, either,” Julie said bluntly.

“You’re fired.”

“But I’ve worked here for years without incident,” Peter said. “Don’t you think firing me is a bit harsh?”

Julie wasn’t backing down, but neither was Peter.

He hired an attorney and sued the firm for age discrimination after learning he’d been replaced by a 29-year-old.

The firm said Peter was dismissed because of his out-of-control behavior.

Decision: The firm won when the judge dismissed the lawsuit.

The court said Peter’s behavior was serious enough to merit his immediate termination.

Case: Angles v. Sears & Roebuck.

What you need to know:

Disciplining workers is never pleasant, but you still have to do it. Fortunately, you can confidently enforce workplace conduct rules without breaking the law if you:

- Look into allegations to find out if there is any merit to bias claims before you make a decision.
- Factor in whether the misconduct was serious – or just relatively minor.
- Review how other managers and supervisors handled similar incidents in the past – and use that plus your company guidelines as a compass.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

No, the company lost when a judge refused to dismiss the case.

In many instances, the court explained, placing people in lateral and equal positions – as far as pay is concerned – cannot be construed as an adverse employment action, and people placed in those positions cannot claim illegal workplace bias.

But this case was different.

In a workplace where everyone knows what the plum assignments are – equal pay or no equal pay – a supervisor can be guilty of discrimination for denying those assignments to one group or another.

So, pay isn’t the only issue.

Other considerations, such as the potential or prestige of a position, can be factors, too.

What to consider, what to do

Some supervisors may be tempted to throw up their hands at this ruling and say, “Do I have to consider EVERYTHING?”

Of course not, no one can. But supervisors will have to consider that equal treatment involves factors other than just money.

And the bottom line is that you’ll generally be OK if you choose the most qualified person for each position, and document those qualification in writing.

Case: Alvarado v. Texas Rangers.

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