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April 14, 2021

OUR TOP STORY

Why there is no such thing as a 'confidential' bias complaint

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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

Your duties in an EEOC inquiry

Lexus dealer out \$60K for sex bias

5 keys to effective messaging

Promotion, raise and gender bias?

Employee claims unfair treatment but wants to work it out quietly

Supervisor declines to deal with complaint in an 'informal' way

Thanks for taking a few minutes to meet with me this late in the day," Supervisor Paul Drexel said sincerely.

"I know you need to make your kids' bus stop and I promise I won't keep you long," he said.

"No problem," said Elaine.

"I'm guessing this is a follow-up to the complaint I made to you."

"Why, yes it is," Paul said.

"In fact, you'll be hearing from HR very soon about the complaint you made against me," he assured her.

Elaine looked up surprised.

"HR! You went to HR?" she exclaimed. "But I specifically asked you not to do that," she said.

"I really didn't have much of choice," he said to her.

More problems

"Are you trying to make me look like a troublemaker?" she asked.

"Taking this to HR is going to cause more problems than it's worth for me," she said.

"No, no, no," Paul said. "Please don't

*Please see **Unfair treatment ...** on Page 2*

Sharpen Your Judgment

Boss struggles with difficult disability case

Lynn, you wanted to see me?"

Supervisor Lynn Rondo looked up to see Heather Ryan lingering in the doorway.

"Yes, come in," Lynn said, prepping herself for this difficult conversation.

"I wanted to talk to you about what happened last week," Lynn started. "I sent you to a job site to do a few hours' work, and you stayed overnight at a hotel without approval."

"I had no choice," Heather replied. "Because of my injury, I can't lift more than 15 pounds at any one time, so the job took me a lot longer than you thought it would."

Lynn was very surprised.

"You've never mentioned this injury," Lynn said.

"We'll need a doctor's note to back this up. But in the future, you need to communicate things like this to us. You can't just violate policies."

Doctor's note

Heather produced a doctor's note a few weeks later which stated she had chronic back pain and muscle weakness.

However, the doctor had never actually met with or examined Heather.

After Heather violated a similar company policy again, she was fired, and she sued for disability discrimination.

The company fought to get the lawsuit 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.

Unfair treatment ...

(continued from Page 1)

misinterpret my intentions here.

“After you said I showed favoritism to men, what did you expect me to do?” he asked.

Favoritism?

“It’s true. I did say you gave more raises to men than you gave to women,” she said.

“And to me, it’s pretty clear you show favoritism to the guys around here.

“But you and I agreed we could work this out between us and that maybe you could come up with a bigger raise for me,” she continued.

“So why did you decide to turn this into such a big deal, especially after we agreed you wouldn’t?”

“If feels like just another one of your schemes to get back at me.”

Never agreed

“I never actually agreed to anything,” Paul replied.

“And you know what, when someone makes a complaint about illegal discrimination, I’m required to take the complaint to HR.

“And that’s especially true when the complaint is about me,” he said emphatically.

“I had no choice but to let them

know what’s going on here.”

“No, it didn’t have to be this way,” Elaine said angrily.

Let the chips fall

“You’re just getting too worked up because I questioned some of your decisions,” she said.

“I’m willing to stand by my decisions,” said Paul. “That’s why I ran this upstairs.

“Let’s just let HR look into all this and let the chips fall where they may.”

“Congrats,” Elaine said. “You wanted to humiliate me and you’ve succeeded.

“Now I will be branded as a troublemaker.”

Rather than wait for the investigation, Elaine quit and sued, charging that Paul had reported her complaint to HR just to create a hostile environment for her.

The firm argued the supervisor was obligated to report the

complaint to HR.

Decision: The company won when the court dismissed the case. A judge said the supervisor couldn’t let a charge of discrimination, even one made confidentially, pass without putting himself and his firm at risk.

Key: There is no such thing as a “confidential,” “casual” or “informal” charge of illegal bias.

Case: *Nagle v. RMA.*

What you need to know:

It may come to pass that an employee will try to use a bias charge as a way to gain an advantage. When you suspect that:

- Inform the person that you recognize a complaint has been made against you.
- Immediately relay the complaint to your direct supervisor, and to HR, or whomever your organization has designated in its anti-bias policy.
- Keep good, clear notes about any conversations you have with any employees involved, especially the person lodging the original complaint. Turn those notes over to HR as you complete them.

TEST YOUR KNOWLEDGE

What are your obligations in an EEOC investigation?

The Equal Employment Opportunity Commission investigates tens of thousands of complaints each year, so it’s not far-fetched to say you could one day be involved in such an inquiry.

To test your knowledge of your obligations during an investigation, respond *True* or *False* to the following:

1. Once the EEOC announces an investigation, you must retain all pertinent records going back no more than 30 days prior to the date of the complaint.
2. Written statements by a supervisor responding to an EEOC investigation are considered confidential and only for use by the EEOC in the investigation.
3. If the EEOC asks to do on-site interviews with you or other employees, you have the right to schedule those interviews at a time that’s least disruptive to business.

ANSWERS

1. *False.* Federal regulations mandate that an employer must preserve “all personnel records relevant to the charge” until final disposition of the charge or any lawsuit. That means there’s no beginning or end date on retaining relevant records. Once the EEOC announces an investigation, you’re obligated to hold on to all existing paper and electronic records.
2. *False.* Such statements will be shared with the employee who filed the complaint and could be used as evidence if the complaint ends up in court.
3. *True.* The EEOC generally honors scheduling requests for interviews, as long as the requests don’t appear to be a delaying tactic or for the purpose of avoiding interviews.

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.

MD tech firm to pay \$60K for disability bias

What happened: A senior administrator at an Optimal Solutions & Technologies, Inc. facility in Hyattsville, MD, informed his supervisor that he had a benign brain tumor which would require about six weeks of radiation treatment, and that the treatments, which would be scheduled after work, would not affect his ability to perform his job.

The EEOC charged that despite his good job performance, OST abruptly fired the administrator about one month after he disclosed his medical condition and only one week before he was scheduled to begin his radiation treatment.

Decision: Along with agreeing to pay \$60,000 in relief to the employee, OST agreed to distribute its ADA and reasonable accommodation policies to employees; train on the ADA; provide a neutral letter of reference for the employee; post a notice of the settlement and posters required by EEOC regulations; and report to the EEOC on its compliance.

Cite: EEOC v. Optimal Solutions & Technologies, Inc.

TN Lexus dealer out \$60K for sex discrimination

What happened: Performance of Brentwood, L.P., doing business as Lexus of Cool Springs, in Nashville, subjected a female service consultant to different treatment than similarly situated male co-workers, and then fired

her because of her sex.

According to the EEOC, Lexus of Cool Springs failed to permit female employees to use available leave in circumstances where it permits similarly situated male employees to do so.

Decision: Along with agreeing to pay \$60,000 to settle the case, the dealership must conduct Title VII training for service consultants and post a notice for two years stating that it will not engage in unlawful discrimination or retaliation.

Cite: EEOC v. Performance of Brentwood, L.P.

OR restaurant out \$120K for sexual harassment

What happened: A male manager at the New China restaurant in Medford, OR, repeatedly targeted female employees ages 15-20 with sexual comments and inappropriate touching that escalated from unwanted hugs to groping.

The manager, in his 50s, mostly worked the night shift. Because he spoke both English and Chinese, he was relied on to manage the English-speaking workers, which included the young women.

Decision: While the manager faces separate criminal charges, the restaurant agreed to pay \$120,000 to five former female employees. New China also agreed to train its managers, supervisors and employees on how to investigate sexual harassment and retaliation complaints.

Cite: EEOC v. New China.

STOP, LOOK, LISTEN ...

Effective messages: 5 keys

If you're struggling to get your employees to hear your HR messages through the noise, here are five ideas:

Schedule it

It's essential for managers to actually schedule time to talk with teams regularly, even daily. It might be difficult with a remote group juggling other responsibilities. But researchers said many teams find agreeable times early and late in the day. That way, important messages are far less likely to be ignored.

Make it purposeful

Be clear on the purpose and outcome for conversations, so employees take away as much they put into meetings.

Make time to think

Your messages won't get results if employees can't stay focused on their individual work after hearing it. Encourage employees to schedule thoughtful periods so they can take the next steps in the project.

More audio, less video

Research shows work teams communicate more effectively using audio over video.

Without visual cues (which are limited on computer screens), team members speak and listen more effectively during calls.

Plus, the quality of the interaction increases. They come up with more impactful ideas, share more useful information and increase team effectiveness.

Less is more

Researchers also found the fewer ideas in a message, the more likely the message gets the necessary action or response.

For instance, if you have three things to cover, frame them as three separate discussions, instead of one.

It's easier to get in-depth and exchange ideas about each topic.

SUPERVISORS SCENARIO

She refuses a transfer and a promotion – then files a claim of gender discrimination

Trying to resolve employee dispute puts supervisor in a bind

Supervisor Tim Nelson was eager to meet with Rachel McTearson. He'd come up with what he thought was a win-win for her difficult situation.

"Thanks for coming by," Tim said to Rachel. "There's an opening in Springfield. It will mean a raise and a chance to get you away from Rich."

"Now hold on," Rachel said. "Why am I the one who's being asked to transfer? Why can't Rich go?"

"Right now, I need someone with Rich's skills here," Tim explained.

Mr. Self-Important

"Oh please, anyone can do what Rich does," Rachel said. "He tries to make it out to be much more complex than it really is. It's just the way he's always been ... Mr. Self-Important."

"I'm well aware of the history between the two of you," Tim said. "And I can tell you that Rich has been warned about his tone. I made very clear to him that one more argument – with anyone here – and he's fired."

"I don't know," Rachel said. "Rich causes all the problems, but I'm the one who gets transferred."

"But the transfer comes with a raise," Tim pointed out.

"And a much longer commute," Rachel added. "No! I don't want to be transferred."

"You're painting me into a corner," Tim warned her.

Rachel quit rather than accept the transfer.

Then she sued for gender bias, saying her supervisor tried to force her to accept an undesirable transfer, while the man involved in the dispute suffered no consequence.

The firm asked the court to dismiss the case.

Decision: The company lost when the court declined to dismiss the case. The judge ruled that the transfer could be seen as holding only the woman responsible for the friction between the two employees.

Case: Maglietti v. Nicholson.

What you need to know:

Disputes between employees can easily end up with the supervisor in the middle. To avoid getting stuck in that situation:

- As much as possible, get the facts behind the dispute; sometimes the problem really is mostly the fault of one employee who needs to be corrected, and disciplined if needed.
- Ask HR's help to work out a fix for the problem; in cases like this another voice won't replace yours, but it could help calm things and settle the situation without a legal flap.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

Yes, the company won when a court dismissed Heather's case.

Heather's attorney argued that Heather was covered under the Americans with Disabilities Act because of her back pain and muscle weakness.

She couldn't lift more than 15 pounds, so Heather needed an accommodation, the attorney said. Instead of granting her an accommodation, the company fired Heather.

But the court didn't see it that way.

It said Heather violated a company policy before even disclosing her injury and lifting restriction. Furthermore, because the doctor's note came from a physician who hadn't examined Heather, it couldn't qualify Heather as an

ADA-protected individual – meaning she wasn't owed an accommodation.

Her firing based on the policy violations was justified, the court said.

Proper documentation is required

This case goes to show that when employees are claiming to be disabled, they need to have the proper documentation to back this up. A doctor's note is usually enough, but as this court stated, the doctor needs to have actually examined the employee.

Heather may have been able to qualify under the ADA if she'd been examined and gone about obtaining the doctor's note properly.

Case: Tesone v. Empire Marketing Strategies.

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