

Supervisors LEGAL UPDATE™



Get More
Online

Check out our
ready-to-use
training
materials today.

A fast-read source of information to help managers understand and comply with federal and state employment laws

May 3, 2021

OUR TOP STORY

Applying the rules 'evenly' is rarely as simple as it sometimes seems

ONLINE

Check out this exclusive online content:

www.SupervisorsLegalUpdate.com

Management Minutes

6-point checklist to document better



Stay Legal!

7 questions to ask yourself before deciding whether to fire someone



INSIDE

Performance reviews done well

Toolmaker hit for disability bias

Inspiring your underperformers

Men got promoted more than women

Employee claims boss plays favorites – NLRB steps in

Some people get away with stuff all the time

“Why did you put all these photos on my desk?” asked Supervisor Glenn Daniels.

“To prove to you that other people get away with stuff all the time, stuff you punish me for,” said Rachel Munson.

“This isn’t about the hat again, is it?” Glenn asked cautiously.

“I thought we settled that.”

“Settled! I swear, men are from Mars,” Rachel said.

“Did you even think to ask me why I was wearing that hat?” she asked.

“I knew it was against our dress code –

but I had a good reason for doing it.”

“Why are you bringing this up again?” Glenn asked.

Bad haircut

“What’s a woman supposed to do if she just got the worst haircut in the world?” Rachel asked.

“Men just walk into a barber shop, and it’s snip-snip. No big deal.

“It’s completely different for women.

“You get a bad cut like I did, and you

Please see Favorites ... on Page 2

Sharpen Your Judgment

Online threats result in firing – and bias lawsuit

HR manager Lynn Rondo had just confirmed her COVID vaccine appointment when company attorney Eric Bressler knocked on her door.

“Got a minute?” Eric asked.

“Sure, come in,” Lynn replied. Eric sat down and sighed heavily.

“I’ll cut to the chase. Karen Miller is suing us for discrimination. She says she was fired for her Facebook posts because she’s white.”

Double standard?

“Goodness gracious,” Lynn muttered. “You and I both know that Karen’s Facebook post about the recent protest was incredibly offensive. She said she wished the protesters would be run over!”

“I know, it was completely out of line,” Eric said with a nod. “The problem is, two other employees, Alan and Sierra, also posted about the protests, but they weren’t fired.”

“Alan and Sierra didn’t say anything half as bad as Karen,” Lynn argued. “They didn’t post anything violent, they just generally supported the protesters.”

“I know,” Eric said. “But she might be able to make a case that we took Alan and Sierra’s side because they’re African American.”

“We need to fight this,” Lynn responded.

When Karen sued for race discrimination, the company fought to get the case dismissed.

Did it 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.

Favorites ...

(continued from Page 1)

just want to put a bag over your head – or a hat.

“I was so embarrassed, I didn’t want anyone to see it.”

“It didn’t matter to me who saw it or not,” Glenn said.

“I told you I didn’t want to see that hat on your head. I thought I made it pretty clear.

“When you wouldn’t take it off, you left me no choice – I had to write you up.

“If people knew I didn’t follow through on what I said, they’d start doing whatever they wanted.”

“That’s what I’m talking about,” Rachel said, “with these pictures.”

“They all show someone breaking dress code policies – and you didn’t do anything about it.”

“There’s Jill and her head scarf.

“There’s Josh with tattoos on his arms and his neck, wearing a hat.

“There’s Hank wearing a hat and a T-shirt – my God, every woman in this place should be complaining about what his shirt says.”

Neglected job?

“So that’s why you were taking pictures with your cell phone instead of working,” Glenn said.

“People complained to me that you didn’t ask them first.

“It’s in the handbook: Taking unauthorized photos on company property is a fireable offense.

“There’s no excuse for not knowing rules like that – that’s why we put them online.”

Was it the same?

“We’re letting you go because you took these pictures without asking people for permission.”

“What about the pictures posted in the break room?” Rachel said.

“Nobody asked those people.”

“And nobody complained either,” Glenn said.”

Rachel said her firing was an unfair labor practice and violated federal law.

The National Labor Relations Board filed suit. It said her right to take photographs was protected as a “concerted activity” in protest of a work rule: the company dress code.

Decision: The company lost and had to reinstate the employee, with back pay.

Key: Supervisors are reminded each day how important it is to be consistently fair and evenhanded in enforcing policies.

Supervisors are expected to treat everyone the same. Skirting some rules, but not others, causes problems.

Case: *NLRB v. White Oak Manor.*

What you need to know:

The National Labor Relations Act protects the rights of union and non-union employees to associate toward common goals.

This is called a protected concerted activity, and two key elements of these kinds of activities include:

- Employees may engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.
- To be “concerted,” the action must be engaged in with or on the authority of other employees, and not solely on behalf of the single complaining employee.

TEST YOUR KNOWLEDGE

Performance reviews done well make a real difference

When done properly, a performance review is one of the best tools that managers have to boost employee engagement and productivity.

To test your knowledge of doing performance reviews well, respond *True* or *False* to the following:

1. We all know what a “bad attitude” looks like when we see one, but they can be very tricky to define when trying to identify and correct workplace behaviors.
2. If any employee is currently performing well, you should avoid putting a damper on that by bringing up older performance issues that may have existed months in the past.
3. It’s generally a good idea to separate the actual performance review, and discussions about future expectations, from any salary/raise discussions.

ANSWERS

1. *True.* Managers should strive to be specific about behavior, and avoid general phrases like “bad attitude.” While everyone may know what a bad attitude looks like, it’s better to be specific about what performance deficiencies stem from that attitude, such as lateness, not meeting deadlines, or creating disruptions with co-workers, etc.
2. *False.* While you don’t want to be seen as dredging up old issues, it’s important to touch on where an employee has been and how far the person has come, or how much they’ve improved. This can set a very positive stage for future growth and development.
3. *True.* Future performance expectations, and any forthcoming raise, should be seen as separate discussions. In no case should the raise be viewed as “burying” the employee’s future improvement efforts. That’s a recipe for failure.

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.

MS toolmaker out \$32K for disability bias

What happened: A sorter with sickle cell disease requested that Valley Tool, Inc., a precision machine shop facility located in Water Valley, MS, allow her to take leave on the occasional days her blood disorder made her too ill to work. Instead, the suit alleged, Valley Tool removed the sorter from the work schedule, placed her on involuntary leave of absence, and then fired her because of her disability and in retaliation for her complaint about her supervisor's comments about her disability.

The lawsuit also charged that Valley Tool failed to maintain medical records separate from employee personnel files.

Decision: Along with agreeing to pay \$32,500 for discrimination and retaliation, Valley Tool also agreed to train its supervisors, managers and owners to recognize and respond to disability discrimination, and to annually report complaints of disability discrimination to the EEOC.

Cite: EEOC v. Valley Tool, Inc.

TX medical group loses \$375K religious bias case

What happened: Shepherd Healthcare, a medical practice in Flower Mound, TX, conducted mandatory meetings each morning that involved prayer and a reading of Biblical verses, including discussion of how those principles applied to the employees' personal lives.

An employee in the call center, who followed the principles of Buddhism, asked several times to be excused from attending the religious portion of the mandatory daily staff meeting as a religious accommodation. Her requests for accommodation were denied, and she was fired just one day after she had renewed her request to be excused from the Bible meetings.

Decision: A federal court issued a \$375,000 judgment against the employer.

Cite: EEOC v. Shepherd Healthcare.

CA tree farm pays \$40K to settle sex bias case

What happened: Family Tree Farms, Inc., of Reedley, CA, allegedly violated federal law when it disciplined two female employees and singled them out because of their sexual orientation, required them to segregate from other employees, and subjected them to harassment.

The EEOC investigated the allegations and found reasonable cause to believe that Family Tree Farms violated Title VII of the Civil Rights Act of 1964.

Decision: The farm agreed to pay \$40,000 in compensatory damages and provide training on Title VII with a specific emphasis on sex and sexual orientation discrimination to all its employees and management.

The EEOC will monitor compliance with this agreement.

Cite: EEOC v. Family Tree Farms, Inc.

STOP, LOOK, LISTEN ...

Managing underperformers

HR leaders and supervisors who want to manage underperformers can try this proven approach.

Clear expectations

It's important to set clear expectations. When you manage underperformers who think they're rock stars, you want to be extra clear, extra vigilant.

That's because when you say, "It's OK," they hear, "It's A-OK!!!!"

Be direct. Be specific. For instance, "You must complete this assignment by Friday at 2 p.m. 'Complete' means X, Y and Z are done and checked for quality. Your accuracy rate must be 93% or higher. If not, we'll start the Performance Improvement Plan initiation. Do you understand, and do you agree to these terms?"

Resources and support

Many know-it-alls don't recognize they lack skills to do their jobs right. They figure if they're in the position, they must be the right person.

That's why it's important to offer underperformers extra resources and support. Try weekly progress reports or an experienced mentor.

Temper your praise

When you manage know-it-alls, be stingy with praise.

Praise great work, then link positive comments to other things you want to address. Be clear about the necessary new behavior and why it's critical.

Recognize limits

At some point, you have to consider if you're willing to invest more time and resources to lifting up a know-it-all.

It may be time to move that underperformer into a role that better matches his or her legitimate skill level.

Underperformers who won't accept advice, help and additional resources, or won't admit faults, won't likely change, and might have to be shown the door.

SUPERVISORS SCENARIO

She claims men always get the inside track when it comes to promotions: Is she right?

Was she shut out of the running for promotion?

“How come we haven’t heard anything about who you are promoting to be your assistant?” Jill asked. “I’m still hoping it’s me.”

“Oh yeah, that,” Mike said. “I meant to tell you that with the budget cuts and all, I’ve decided not to fill that job.”

“Really?” Jill said. “We all know you could use the help and we are stretched so thin as it is.”

“No doubt,” Mike agreed. “That’s why I am going to have Rich fill in when needed and help me out here and there.”

“That’s not fair!” Jill exclaimed. “That gives him the inside track for the job when it does open up. How about letting me handle some of those duties, too?”

Too complicated?

“Well, that could get too complicated,” Mike said. “I just want one person handling things and Rich has the most experience. I wish he was as eager as you to do it. He’s not getting paid more.”

“Is it just about experience?” Jill asked. “What about all those great performance

reviews I’ve gotten?”

“If and when the job officially opens up, of course I’d consider that in your favor,” Mike assured her. “But for now, I’m going with Rich.”

“This company doesn’t have a great track record promoting women,” Jill said. “And I’m getting the feeling that’s not going to change anytime soon, either.”

Jill sued for gender discrimination, claiming she was shut out of the running for a promotion because she was female.

The company argued she would get a fair shot at the job if or when it opened up, but that the temporary assignment was based solely on experience, not gender.

Decision: The company won. A judge said there was no credible proof that the supervisor acted unfairly, especially since no promotion was ever made.

Key: Not every decision you make will be accepted as “fair.” That’s why it pays to be sure your personnel actions are backed by solid, documented business reasons.

Case: Bacon v. Hennepin County Medical Center.

What you need to know:

The law forbids discrimination in any aspect of employment.

This can include hiring, firing, pay, assignments, promotions, layoffs, training and benefits.

It’s illegal to:

- post a job ad that favors one gender over another
- base hiring or promotion decisions on stereotypes and assumptions about gender, and
- discriminate in the payment of wages, or administration of benefits, based on an employee’s gender.

Sharpen Your Judgment – THE DECISION

(continued from Page 1)

Yes, the company won when a judge dismissed Karen’s discrimination claim.

Karen’s attorney argued that she was fired for being white and speaking out against the protest, and pointed to Karen’s co-workers’ posts.

Both Alan and Sierra posted about the protests, yet they weren’t disciplined. Karen’s race played a role in the company’s decision, the attorney argued.

But the court disagreed.

It said that there was a stark difference between Karen’s posts and her colleagues’. Karen expressed violence online, while Alan and Sierra didn’t.

The company was justified in firing an

employee with violent tendencies, the court said – and it had nothing to do with Karen’s race. Case dismissed.

Violent threats not protected

This case serves as a good reminder about what online activity is protected, and what isn’t.

The NLRA allows employees to discuss working conditions and terms of employment online without fear of retaliation. But that’s about where the protections stop.

As this case demonstrated, controversial and threatening social media posts aren’t protected, and employees can be justifiably fired for them.

Case: Ellis v. Bank of New York Mellon Corp.

EDITOR: RICH HENSON

ASST. EDITOR: RACHEL MUCHA

MANAGING EDITOR:
TOM D’AGOSTINO

PRODUCTION EDITOR: JEN ERB

EDITORIAL DIRECTOR:
CURT BROWN

Subscriptions: 800-220-5000

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting or other professional services. If legal or other expert assistance is required, the services of a competent professional should be sought. — From a declaration of principles jointly adopted by a committee of the American Bar Association and a committee of publishers.

♻️ Printed on recycled paper.

Copyright © 2021 Progressive Business Publications. Please respect our copyright: Reproduction of this material is prohibited without prior permission. All rights reserved in all countries.